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HOME INSURANCE COMPANY, **PLAINTIFF,** **v.** **CORNELL-DUBILIER ELECTRONICS, INC., ET AL.,** **DEFENDANTS.**	**SUPERIOR COURT OF NEW JERSEY** **LAW DIVISION: MERCER COUNTY** Civil Action Docket No. MER-L-5192-96
CORNELL-DUBILIER ELECTRONICS, INC., ET AL., **PLAINTIFFS,** **v.** **UNITED INSURANCE COMPANY,** **DEFENDANT.**	Civil Action Docket No. MER-L-2773-02
CORNELL-DUBILIER ELECTRONICS, INC., ET AL., **PLAINTIFFS,** **v.** **COLUMBIA CASUALTY COMPANY, ET AL.,** **DEFENDANTS.**	Civil Action Docket No. MER-L-463-05

SUPPLEMENTAL MEMORANDUM OF CORNELL-DUBILIER ELECTRONICS, INC. IN SUPPORT OF ITS SUMMARY JUDGMENT MOTION AGAINST THE LONDON MARKET INSURERS WITH RESPECT TO THE EXXON POLICIES

None of the three issues on which further briefing has been allowed is sufficient to defeat summary judgment on behalf of Cornell-Dubilier Electronics, Inc. ("CDE"). First, Exxon's attempt at the close of oral argument on September 10, 2010 to distinguish comment e of Section 311 of the Restatement (Second) of Contracts is without merit. Not even the 1961 Georgia case that Exxon mentioned provides authority for its argument. Second, Exxon's known loss argument is unavailing, since CDE was not aware of any claims relating to the two New Jersey sites until many years after the Exxon Policies had expired. Under New Jersey law, the known loss doctrine is not triggered unless a policyholder knew prior to the inception of the policy of the specific liability for which coverage is sought. Third, after fourteen years of discovery in this action and after many years of discovery on the Exxon Policies in the California coverage action, neither Lloyds nor Exxon speaking as its potential indemnitor can credibly claim that it has not had ample opportunity to explore each and every potential defense to coverage. Fairness dictates that after fourteen years of litigation CDE be permitted to move to the next phase of this case.

I. The Alleged Commutation of the Exxon Policies

In its original briefing on summary judgment, CDE had cited extensive cases and hornbook authority to support the proposition that absent the consent of an insured party, a settlement cannot extinguish coverage rights that have already accrued to that party. In response to that overwhelming authority, Exxon in its Opposition relied on Section 311 of the Restatement (Second) of Contracts but ignored comment e to that Section which expressly stated that coverage under a liability insurance policy cannot be cancelled once the occurrence has taken place. At the close of oral argument, Exxon's counsel sought to distinguish that comment to the Restatement by claiming it was based on a 1961 Georgia case, *State Farm Mut. Auto. Ins. Co. v. Kendall,* 104 Ga. App. 481, 484 (Ga. Ct, App. 1961), which dealt only with automobile accident victims and not additional insureds.

While it is true that the 1961 Georgia case involved the victim of an automobile accident, that case offers Exxon no support, since it broadly holds that a liability insurance policy cannot be rescinded after an occurrence has happened. *Id.* at 485 ("Rights against insurer arise immediately upon the happening of the accident and cannot be destroyed by attempted subsequent cancellation, release or compromise by insured and insurer"). That case makes no distinction between the rights of an additional insured under a policy or the rights of a victim who might obtain the benefits under that policy. Indeed, it is illogical for Exxon to even try to distinguish between additional insureds and victims because it follows inexorably that once the rights of an additional insured under a liability policy are terminated so too would the rights of a potential victim seeking to obtain the benefit of that policy.

In the end, there is substantial case law which holds that the rights of an additional insured cannot be terminated after an occurrence has taken place. *See, e.g.*, *Fire & Cas. Ins. Co. of Connecticut v. Ligon*, 86 Fed. Appx. 517, 520-21 (3d Cir. 2004) (employer and insurer cannot retroactively reduce coverage available to employee through employer's policy); *TIG Ins. Co. v. Freeland*, 330 B.R. 709, 711 (Bankr. N.D. Ind. 2004) (holding that a former parent company cannot retroactively rescind insurance coverage of its subsidiary and stating that this conclusion is "so clear that the court is surprised that the plaintiffs felt it necessary to seek a declaration"); *Fageol Truck & Coach Co. v. Pacific Indem. Co.*, 18 Cal. 2d 731, 738, 741-42 (Cal. 1941) (rights of additional insured cannot be cancelled retroactively by insurer and named insured); *Detroit Auto. Inter-Ins. Exchange v. Ayvazian*, 62 Mich. App. 94, 100 (Mich. App. Ct. 1975) ("The first named insured needs the consent of other named insured parties before the accrued rights of the others may be abrogated"); *Lumbermens Mut. Cas. Co. v. Iowa Home Mut. Cas.*

Co., 405 P.2d 160, 164-65 (Okla. 1965) (vehicle owner and insurer cannot retroactively rescind policy coverage for omnibus insureds).

No matter how much it ducks and weaves, Exxon has not and cannot distinguish this overwhelming case law and Exxon has cited to no contrary cases. As this Court indicated at oral argument, *Couch on Insurance* states the correct and controlling rule: "A mutual rescission of a liability policy by the insurer and the named insured does not abrogate the accrued rights of the omnibus insureds without their consent." *Couch on Insurance* 3d vol. 2 (2010) § 31.49.

II. The Known Loss Doctrine in New Jersey

Contrary to Exxon's contention, summary judgment cannot be forestalled based on Lloyds' known loss defense. To make out a known loss defense in New Jersey, it is not enough to show that the policyholder knew of damages and potential liability prior to the inception of the insurance policy; the known loss doctrine only bars coverage when there is actual liability asserted against the insured. As the Appellate Division has explained,

> [a]s long as there remains uncertainty about damage or injury that may occur during the policy period and the imposition of liability upon the insured, and no legal obligation to pay third party claims has been established, . . . there is a potentially insurable risk for which coverage may be sought in the context of continuous or progressively deteriorating property damage insurable under a third party comprehensive liability policy.

CPC International, Inc. v. Hartford Accident & Indemnity Co., 316 N.J. Super. 351, 378 (App. Div. 1998), *cert. denied*, 158 N.J. 73 (1999).

In attempting to show a basis for a known loss defense, Exxon pointed to CDE's knowledge of environmental issues in the late 1970s and early 1980s with respect to its New Bedford, Massachusetts facility and to CDE's general knowledge that PCBs might cause harm if released to the environment during manufacturing operations. (*See* Certification of David Bates, Exh 2-6). Even assuming *arguendo* that CDE knew that there was environmental harm at the

New Bedford facility and potential harm at other facilities where CDE conducted historical manufacturing with PCBs, that knowledge would not be sufficient to create a colorable known loss defense with respect to the New Jersey sites. The Third Circuit has succinctly stated New Jersey law on the known loss doctrine as providing that "certainty of legal liability, rather than certainty of damage, is required to trigger application of the doctrine." *Pittston Co. Ultramar Am. Ltd. v. Allianz Ins. Co.*, 124 F.3d 508, 518 (3d Cir. 1997).

The Exxon policies were issued for the years 1979 to 1983. It is undisputed and undisputable that environmental claims against CDE for the South Plainfield and Dismal Swamp sites were not asserted against CDE until 1992 and later.[1] Under these circumstances, the known loss doctrine cannot apply to bar claims under the Exxon Policies with respect to the South Plainfield and Dismal Swamp sites.

III. More Discovery

If fourteen years of discovery, including extensive discovery about the two New Jersey Sites, CDE's operations, and the Exxon Policies, were not enough, Lloyds and Exxon also conducted years of discovery about the Exxon Policies in the California Coverage Action. Surely, Lloyds has had ample opportunity to prepare the factual basis for its defense of this action.

[1] CDE did not receive notice of a claim involving the South Plainfield Site until 1992 (Maniatis Cert., Exh. 3) and did not receive notice of a claim for the Dismal Swamp Site until 2001 (Sanoff Supp. Cert., ¶ 13).

Respectfully Submitted,

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